

SECURITIES AND EXCHANGE COMMISSION
(Release No. 34-50357; File No. SR-NYSE-2004-45)

September 13, 2004

Self-Regulatory Organizations; Notice of Filing and Immediate Effectiveness of Proposed Rule Change by the New York Stock Exchange, Inc. to Rescind Advice Previously Provided Regarding the Calculation of Transaction Fees

Pursuant to Section 19(b)(1) of the Securities Exchange Act of 1934 (“Act”),¹ and Rule 19b-4 thereunder,² notice is hereby given that on August 16, 2004, the New York Stock Exchange, Inc. (“NYSE” or “Exchange”) filed with the Securities and Exchange Commission (“SEC” or the “Commission”) the proposed rule change as described in Items I and II below, which Items have been prepared by the NYSE. The Commission is publishing this notice to solicit comments on the proposed rule change from interested persons.

I. Self-Regulatory Organization’s Statement of the Terms of Substance of the Proposed Rule Change

The NYSE hereby proposes to amend Exchange Rule 440H to include an interpretation that would rescind advice the Exchange had previously provided to members and member organizations regarding the calculation of transaction fees.

II. Self-Regulatory Organization’s Statement of the Purpose of, and Statutory Basis for, the Proposed Rule Change

In its filing with the Commission, the Exchange included statements concerning the purpose of, and basis for, the proposed rule change and discussed any comments it received on the proposed rule change. The text of these statements may be examined at the places specified in Item IV below. The Exchange has prepared summaries, set forth in Sections A, B, and C below, of the most significant aspects of such statements.

¹ 15 U.S.C. 78s(b)(1).

² 17 CFR 240.19b-4.

A. Self-Regulatory Organization’s Statement of the Purpose of, and Statutory Basis for, the Proposed Rule Change

1. Purpose

Summary

On June 28, 2004, the Commission adopted new Rule 31 under the Act,³ regarding the calculation, payment, and collection of fees prescribed by Section 31 of the Act.⁴ New Rule 31, and the SEC’s commentary in the Rule 31 Adopting Release, have rendered the instructions in the “Calculation of Fees – Rounding Up” section of NYSE Information Memo No. 01-51, dated December 28, 2001, inapplicable, because Exchange members and member organizations will no longer be making such calculations for purposes of determining the amounts that they owe the Exchange pursuant to NYSE Rule 440H. The Exchange is proposing to add Interpretation /01 to NYSE Rule 440H that would instruct Exchange members and member organizations to disregard the “Calculation of Fees – Rounding Up” section of NYSE Information Memo No. 01-51.

Background

Exchange Rule 440H requires each Exchange member or member organization engaged in clearing or settling transactions effected upon the Exchange to pay to the Exchange as a “Transaction Fee” a sum equal to the dollar amount as prescribed in Section 31 of the Act based on the total aggregate dollar sales volume the member or member organization has reported monthly on its Form 120-A. Historically, the funds collected by the Exchange from members and member organizations pursuant to Rule 440H were remitted in their entirety to the Commission.

³ 17 CFR 240.31.

⁴ 15 U.S.C. 78ee. See Securities Exchange Act Release No. 49928 (June 28, 2004), 69 FR 41059 (July 7, 2004) (File No. S7-05-04) (“Rule 31 Adopting Release”).

NYSE Information Memo No. 01-51 instructs each member or member organization to use a specific “rounding up” formula to calculate the fee relative to each transaction.⁵

In the Rule 31 Adopting Release, the Commission established new procedures governing the calculation, payment, and collection of fees and assessments on securities transactions owed by national securities exchanges and national securities associations (collectively, “self-regulatory organizations” or “SROs”) to the Commission pursuant to Section 31 of the Act.⁶ New Rule 31, Form R31, and temporary Rule 31T establish procedures for the calculation and collection of Section 31 fees and assessments. Under the new procedures, each SRO must provide the Commission with data on its securities transactions. The Commission will then calculate the amount of fees and assessments due based on the volume of these transactions, and bill the SROs that amount.

In the Rule 31 Adopting Release, the Commission noted that, in practice, SROs obtain the funds to pay Section 31 fees and assessments by assessing charges on their members, and the members in turn pass these charges to their customers.⁷ The Commission stressed that Section 31 “does not address the manner or extent to which covered SROs may seek to recover the costs of their Section 31 obligations from their members. Nor does Section 31 address the manner or

⁵ NYSE Information Memo No. 01-51 states that “[i]n calculating the new fee for a transaction, one should multiply the sale or principal amount of the transaction by the fee rate, which will be truncated at the seventh place after the decimal point. The resulting figure should then be truncated at the fifth place after the decimal point and rounded up to the next cent (if there is any remainder you should round up).”

⁶ Section 31 of the Act provides that the Exchange and other national securities exchanges’ fees will be based on the aggregate dollar amount of sales of securities transacted on the exchange (Section 31(b)), that national securities associations’ fees will be based on the aggregate dollar amount of sales of securities transacted by or through any member of the association otherwise than on a national securities exchange (Section 31(c)), and that national securities exchanges are assessed for each “round turn transaction” in a security future (Section 31(d)). See 15 U.S.C. 78ee(b)–(d).

extent to which members of covered SROs may seek to pass any such charges on to their customers.”⁸

Need for Proposed Interpretation

The Exchange believes that the new Section 31 procedures have rendered the instructions in the “Calculation of Fees – Rounding Up” section of NYSE Information Memo No. 01-51 inapplicable. NYSE Rule 440H does not dictate whether or how members or member organizations should charge customers to recover amounts paid to the Exchange. Therefore, members and member organizations should be relieved of any obligation to follow the rounding up and other calculation procedures described in the “Calculation of Fees – Rounding Up” section of NYSE Information Memo No. 01-51. Proposed Interpretation /01 to NYSE Rule 440H achieves this purpose.

2. Statutory Basis

The Exchange believes that the statutory basis for this proposed rule change is Section 6(b)(4) of the Act⁹ which permits the rules of an Exchange to provide for the equitable allocation of reasonable dues, fees, and other charges among its members, and issuers and other persons using its facilities.

B. Self-Regulatory Organization’s Statement on Burden on Competition

The Exchange does not believe that the proposed rule change would impose any burden on competition that is not necessary or appropriate in furtherance of the purposes of the Act.

⁷ See Rule 31 Adopting Release, Section IV.

⁸ Id.

⁹ 15 U.S.C. 78f(b)(4).

C. Self-Regulatory Organization’s Statement on Comments on the Proposed Rule Change Received from Members, Participants, or Others

The Exchange has neither solicited nor received written comments on the proposed rule change.

III. Date of Effectiveness of the Proposed Rule Change and Timing for Commission Action

The Exchange asserts that the foregoing proposed rule change has become effective upon filing pursuant to Section 19(b)(3)(A) of the Act¹⁰ and Rule 19b-4(f)(6) thereunder¹¹ because it does not:

- (i) significantly affect the protection of investors or the public interest;
- (ii) impose any significant burden on competition; and
- (iii) become operative for 30 days from the date of filing, or such shorter time as the

Commission may designate if consistent with the protection of investors and the public interest; provided that the self-regulatory organization has given the Commission written notice of its intent to file the proposed rule change at least five business days prior to the filing date of the proposed rule change.

The NYSE has requested that the Commission waive the five business-day pre-filing notice requirement and the 30-day pre-operative period, which would make the rule change operative immediately. The Commission believes that it is consistent with the protection of investors and the public interest to waive the 30-day pre-operative period in this case.¹²

Allowing the rule change to become operative immediately should provide Exchange members

¹⁰ 15 U.S.C. 78s(b)(3)(A).

¹¹ 17 CFR 240.19b-4(f)(6).

¹² For the purposes only of accelerating the operative date of this proposal, the Commission has considered the proposed rule’s impact on efficiency, competition, and capital formation. See 15 U.S.C. 78c(f).

and member organizations with appropriate instructions regarding the calculation of transaction fees. The Commission also has determined to waive the five business-day pre-filing notice requirement in this case.

At any time within 60 days of the filing of the proposed rule change, the Commission may summarily abrogate such rule change if it appears to the Commission that such action is necessary or appropriate in the public interest, for the protection of investors, or otherwise in furtherance of the purposes of the Act.

IV. Solicitation of Comments

Interested persons are invited to submit written data, views, and arguments concerning the foregoing, including whether the proposed rule change is consistent with the Act. Comments may be submitted by any of the following methods:

Electronic comments:

- Use the Commission's Internet comment form (<http://www.sec.gov/rules/sro.shtml>); or
- Send an e-mail to rule-comments@sec.gov. Please include File Number SR-NYSE-2004-45 on the subject line.

Paper comments:

- Send paper comments in triplicate to Jonathan G. Katz, Secretary, Securities and Exchange Commission, 450 Fifth Street, NW, Washington, DC 20549-0609.

All submissions should refer to File Number SR-NYSE-2004-45. This file number should be included on the subject line if e-mail is used. To help the Commission process and review your comments more efficiently, please use only one method. The Commission will post all comments on the Commission's Internet Web site (<http://www.sec.gov/rules/sro.shtml>). Copies of the submission, all subsequent amendments, all written statements with respect to the proposed rule

change that are filed with the Commission, and all written communications relating to the proposed rule change between the Commission and any person, other than those that may be withheld from the public in accordance with the provisions of 5 U.S.C. 552, will be available for inspection and copying in the Commission's Public Reference Room, 450 Fifth Street, NW, Washington, DC 20549. Copies of such filing also will be available for inspection and copying at the principal office of the NYSE. All comments received will be posted without change; the Commission does not edit personal identifying information from submissions. You should submit only information that you wish to make available publicly. All submissions should refer to File Number SR-NYSE-2004-45 and should be submitted on or before [insert date 21 days from publication in the Federal Register].

For the Commission, by the Division of Market Regulation, pursuant to delegated authority.¹³

Margaret H. McFarland
Deputy Secretary

¹³ 17 CFR 200.30-3(a)(12).